No. 97-125

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,

*Plaintiffs*,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia; MARK L. EARLY, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; and DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia.

*Defendants*

ORIGINAL ACTION

## MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT, COMPLAINT, AND MEMORANDUM IN SUPPORT

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Dated: April 13, 1998

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

**No. 97-**

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THE REPUBLIC OF PARAGUAY;
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; and
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*Plaintiffs*,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia; MARK L. EARLY, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; and DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia.

*Defendants*.

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ORIGINAL ACTION

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## MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

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Plaintiffs the Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José María Gonzales Avila, as Consul General of the Republic of Paraguay to the United States, respectfully move this Court for leave to file a Bill of Complaint and Brief in Support in an original action, pursuant to 28 U.S.C. § 1251(b)(1), and application to enjoin Defendants from executing a Paraguayan national, Angel Francisco Breard, on April 14, 1998, or thereafter, pending final resolution of the Republic of Paraguay's case against the United States in the International Court of Justice.

In conjunction with this Motion, plaintiffs file a complaint, a memorandum in support of this Motion, and a separate motion for a temporary restraining order or preliminary injunction.

Dated: April 13, 1998

Respectfully submitted,

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*Defendants*.

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ORIGINAL ACTION

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## COMPLAINT

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This action is brought by Plaintiffs Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José María Gonzales Avila, as Consul General of the Republic of Paraguay to the United States, to enforce and give effect to the Order of Provisional Measures of April 9, 1998, issued by the International Court of Justice (the "ICJ Order"). The ICJ Order directed the United States of America to ensure that a national of Paraguay, Angel Francisco Breard, who is now scheduled to be executed tomorrow, Tuesday, April 14, 1998, at 9 p.m. eastern

standard time, not be executed pending resolution of the case brought before the International Court of Justice by Paraguay against the United States. An injunction is necessary to prevent defendants from violating plaintiffs' rights under that Order.

## NATURE OF THE ACTION

1. Plaintiffs bring this action for injunctive relief preventing the Defendants from violating federal law in the form of the ICJ Order, the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, and the Vienna Convention on Consular Relations and its Optional Protocol, 21 U.S.T. 77, 596 U.N.T.S. 261, as well as principles of international comity arising from those instruments, by executing Mr. Breard on April 14, 1998.

2. In addition, Plaintiff Gonzales Avila seeks equitable relief, under 42 U.S.C. § 1983, preventing the defendants from violating plaintiffs' rights under those instruments and principles of international comity.

## JURISDICTION

3. This is a case "affecting Ambassadors . . . and Consuls" within the original jurisdiction of the United States Supreme Court under article III, section 2 of the United States Constitution.

## THE PARTIES

4. Plaintiff Republic of Paraguay is a foreign state.

5. Plaintiff Jorge J. Prieto is the Ambassador of the Republic of Paraguay to the United States. At all relevant times, he had supervisory authority over the consular officers of the Republic of Paraguay in the United States, including consular officers based in the Embassy of Paraguay in Washington, D.C.

6. Plaintiff José María Gonzales Avila is the Consul General of the Republic of Paraguay to the United States with jurisdiction over the consular district encompassing the Commonwealth of Virginia.

7. Plaintiffs Prieto and Gonzales Avila bring this action in their capacities as diplomatic and consular officers and on behalf of the Republic of Paraguay.

8. Defendant James S. Gilmore, III is the Governor of the Commonwealth of Virginia. Pursuant to article V, section 7 of the Constitution of Virginia, the Governor is responsible for "tak[ing] care that the laws be faithfully executed." That responsibility, by virtue of the Supremacy Clause of the United States Constitution, extends to treaties signed by the United States and ratified by the United States Senate. U.S. Const. art. VI.

9. Defendant Mark L. Early is the Attorney General of the Commonwealth of Virginia. He is "the chief executive officer of the Department of Law, and as such shall perform such duties as may be provided by law," including, together with the Commonwealth's Attorney, notifying the trial court that an execution date is to be set when all appeals and collateral proceedings in a death penalty case are completed. Va. Code Ann. §§ 2.1-117, 53.1-232.1 (1997).

10. Defendant Ronald J. Angelone is the Director of Corrections for the Commonwealth of Virginia and is ultimately responsible for carrying out sentences involving a felony in the Commonwealth of Virginia. Va. Code Ann. §§ 19.2-310, 53.1-17, 53.1-20 (1997).

11. Defendant David A. Garraghty is the Warden of the Greensville Correctional Facility in Jarratt, Virginia, and is responsible for executing prisoners sentenced to death in the Commonwealth of Virginia.

## FACTS

The Charter of the United Nations and
the Statute of the International Court of Justice

12. On October 24, 1945, both the United States of America and the Republic of Paraguay became original members of the United Nations. On June 26, 1945, exercising the exclusive power to conduct foreign relations granted to the President of the United States, an officer of the executive branch of the United States signed the Charter of the United Nations. U.S. Const. art. I, sec. 10; id. art. II, sec. 2. The Senate ratified the U.N. Charter on August 8, 1945. The U.N. Charter is part of the "supreme Law of the Land" under the United States Constitution. U.S. Const. art. VI.

13. Under Article 93(1) of the U.N. Charter, "[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice." As a result, the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, is also part of the "supreme Law of the Land" under the United States Constitution. U.S. Const. art. VI.

14. Under Article 94(1) of the Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

15. Pursuant to Article 36(6) of the Statute of the International Court of Justice, "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

16. Pursuant to Article 41 of the Statute of the International Court of Justice, the Court may decide to "indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

Mr. Breard's Death Sentence

17. On September 1, 1992, Mr. Breard was arrested by the Arlington County Police Department on suspicion of murder. The police were aware that Mr. Breard was a Paraguayan national, but they never informed him of his rights to consular assistance under the Vienna Convention. Neither did they inform Paraguay that Mr. Breard was in their custody.

18. On June 24, 1993, Mr. Breard was convicted of capital murder and attempted rape. On June 25, 1993, after hearing evidence related to sentencing, the jury sentenced Mr. Breard to death.

19. Mr. Breard's direct appeals in the courts of the Commonwealth of Virginia were rejected. In addition, Mr. Breard's state habeas corpus proceedings were unsuccessful. There are no further judicial proceedings concerning Mr. Breard pending in the courts of the Commonwealth of Virginia.

20. Mr. Breard has presently pending before this Court a petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit to review the affirmance of the District Court's denial of his petition for a writ of habeas corpus, as well as an original petition for a writ of habeas corpus. Mr. Breard is currently being held on death row at the Greensville Correctional Facility.

21. Mr. Breard is scheduled to be executed at 9:00 p.m. tomorrow, April 14, 1998.

Proceedings in the International Court of Justice

22. On April 3, 1998, the Republic of Paraguay filed an application in the International Court of Justice, instituting proceedings against the United States for violations of the Vienna Convention, during the arrest, trial, conviction and sentencing of Paraguayan national, Angel Breard. The Republic of Paraguay sought the remedy of *restitutio in integrum*. The Republic of

Paraguay based jurisdiction for this action on Article 36(1) of the Statute of the International Court of Justice and the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 25, 1963, art. I, 21 U.S.T. 326, to which both the United States and Paraguay are States Parties.

23. Also on April 3, 1998, the Republic of Paraguay filed a Request for Provisional Measures with the International Court of Justice, requesting the Court to indicate that "the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case." On that same day, the International Court of Justice scheduled a hearing on the Request for Provisional Measures for April 7, 1998.

24. On April 9, 1998, after hearing oral submissions from both parties as scheduled, the fifteen judges of the International Court of Justice unanimously held that Paraguay had established prima facie jurisdiction, the threat of irreparable prejudice to the rights of Paraguay, and urgency for the indication of provisional relief. As a result, the International Court of Justice indicated that "the United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), No. 99, ¶ 41 (Provisional Measures Order of Apr. 9, 1998) (attached hereto as Exhibit A).

Defendant's Imminent Violation of the
U.N. Charter and ICJ Order

25. Defendant James S. Gilmore III, Governor of the Commonwealth of Virginia, has declared publicly that he will not comply with the ICJ Order.

**COUNT ONE**
**(Imminent Violation of the U.N. Charter and ICJ Order)**

26. Plaintiffs repeat and reallege paragraphs 1 through 25.

27. Execution of Mr. Breard by defendants, their successors, employees, officers or agents would constitute a violation of federal law in the form of the ICJ Order and the U.N. Charter.

**COUNT TWO**
**(Imminent Violation of Principles of International Comity)**

28. Plaintiffs repeat and reallege paragraphs 1 through 27.

29. Execution of Mr. Breard by the Defendants, their successors, employees, officers or agents would constitute a violation of principles of international comity constituting federal law and arising from the ICJ Order and the U.N. Charter.

**COUNT THREE**
**(Violation of 42 U.S.C. § 1983)**

30. Plaintiffs repeat and reallege paragraphs 1 through 29.

31. Plaintiff Gonzales Avila is a person within the jurisdiction of the United States.

32. Pursuant to the Supremacy Clause, the ICJ Order and the U.N. Charter secured to plaintiffs, under the laws of the United States, the rights and privileges to have orders of the International Court of Justice complied with by the United States.

33. If Mr. Breard is executed in defiance of the ICJ Order, defendants will have acted under color of state law.

34. Defendants' act in so executing Mr. Breard would constitute a violation of Plaintiff Gonzales Avila's rights and privileges

under the laws of the United States. This Court is therefore empowered to grant equitable relief under 42 U.S.C. § 1983.

## PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

A. Declare that the execution of Mr. Breard by defendant Virginia officials prior to the resolution of the proceedings instituted by the Republic of Paraguay against the United States in the International Court of Justice, or in contravention of any orders of the International Court of Justice, would constitute a violation of federal law in the form of treaties of the United States.

B. Declare that the execution of Mr. Breard by Virginia officials prior to the resolution of the proceedings instituted by the Republic of Paraguay against the United States in the International Court of Justice, or in contravention of any orders of the International Court of Justice, would constitute a violation of principles of international comity that form part of federal law.

C. Enjoin defendant Virginia officials from executing Mr. Breard pending final resolution of the proceedings instituted by Paraguay against the United States in the International Court of Justice.

D. Grant such other and further relief as to this Court may seem just and proper.

Dated: April 13, 1998

Respectfully submitted,

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*Defendants*.

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ORIGINAL ACTION

## MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

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ORIGINAL ACTION

## MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs the Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José María Gonzales Avila, as Consul General of the Republic of Paraguay to the United States (collectively, "Paraguay"), respectfully

submit this memorandum in support of (1) their motion for leave to file a complaint in an original action, and (2) their motion to temporarily restrain or preliminarily enjoin Defendants from executing Paraguay's national, Angel Francisco Breard, on April 14, 1998 or thereafter, pending this Court disposition of the motion for leave to file the complaint, further order of this Court, or a ruling from the International Court of Justice (the "ICJ") on the merits of Paraguay's suit against the United States.

On April 9, 1998, the fifteen judges of the International Court of Justice issued a unanimous order (the "ICJ Order") indicating provisional measures in proceedings instituted by the Republic of Paraguay against the United States of America. The ICJ Order directed that the United States ensure that Paraguay's national, Angel Francisco Breard, not be executed pending resolution of Paraguay's case against the United States in that Court. The provisional measures indicated by the ICJ are binding upon the United States pursuant to Article 94(1) of the United Nations Charter, a treaty of the United States. Because the ICJ Order carries the force of a treaty, it constitutes the supreme law of the land. U.S. CONST. art. VI. Paraguay's complaint seeks an order from this Court enjoining defendants from their imminent violation of that law. The ICJ Order and related declarations are attached to this memorandum as Exhibit A.

This Court has original jurisdiction to hear Paraguay's complaint. Article III, § 2, of the United States Constitution Article III, extends the federal judicial power to "all Cases, in Law and Equity, arising under . . . Treaties" of the United States; "to all Cases affecting Ambassadors, other Public Ministers and Consuls;" and to "Controversies . . . between a State, or the Citizens thereof, and a foreign State . . . ." U.S. CONST. art. III, § 2; *see also Ex parte Gruber*, 269 U.S. 302, 303 (1925).[1] The same section provides that

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1. *See also* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *id.* NO. 81 at 487 ("Public ministers of every class, are (continued...)

"[i]n all cases affecting Ambassadors, other public Ministers and Consuls," this Court shall have original jurisdiction.

This Court should grant Paraguay the relief sought in the complaint, an injunction preventing Defendants from executing Angel Breard on April 14, 1998 or, in the alternative, a preliminary injunction pending further briefing on the merits, because such execution would violate Paraguay's federally protected rights and cause Paraguay irreparable harm. Moreover, the requested injunction would be in the public interest because it would enable the United States to remain in compliance with its obligations to the ICJ and the United Nations.

## Facts

On September 1, 1992, a Paraguayan citizen, Angel Francisco Breard, was arrested by the Arlington County police department on suspicion of murder. Although they were aware that Breard was a Paraguayan national, defendants never informed Breard of his right under the Vienna Convention to consular assistance from Paraguay. Nor did they inform Paraguay that Breard was in their custody. ICJ Order § 2-4.

On April 3, 1998, the Republic of Paraguay instituted proceedings in the International Court of Justice against the United States, claiming that by failing to notify its national, Angel Francisco Breard, of his right to contact the Paraguayan consulate at the time of his arrest on suspicion of capital murder, officials of the Commonwealth of Virginia had violated the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261

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1. (...continued)
the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation").

(the "Vienna Convention"). ICJ Order, preamble and ¶ 1. Paraguay sought, among other remedies, *restitutio in integrum*, or the restoration of the situation that had existed prior to the unlawful act or omission. *See, e.g.*, Chorzów Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Judgment (Indemnity) of Sept. 13); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 901, reporter's note 3 (1987). In conjunction with its application instituting proceedings, Paraguay requested that the ICJ indicate provisional measures directing the United States to ensure that Mr. Breard not be executed during the pendency of the proceedings. ICJ Order ¶¶ 6-9.

On the same day, the ICJ scheduled a hearing on the request for provisional measures for Tuesday, April 7. ICJ Order ¶ 12. On the scheduled date, the ICJ, all fifteen judges sitting, heard argument on Paraguay's request for provisional measures at the Peace Palace in The Hague. Complaint ¶¶ 16-22. On April 9, the Court issued a unanimous order that "the United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." Vienna Convention on Consular Relations (Para. v. U.S.), No. 99, ¶ 41 (Provisional Measures Order of Apr. 9, 1998) (attached as Exhibit A to this memorandum). The order also stated that the Court would "ensure that any decision on the merits [would] be reached with all possible expedition." *Id.*, ¶ 40. Judge Stephen M. Schwebel of the United States, the President of the Court, concurred in the order and issued a separate declaration, in which he stated that the provisional measures ordered "ought to be taken to preserve the rights of Paraguay in a situation of incontestable urgency."

By an order dated February 25, 1998, the Circuit Court of Arlington County, Virginia, in a ministerial act, set Mr. Breard's execution for April 14, 1998. Defendants have stated that they do not intend to obey the ICJ Order absent an order from this Court. *See, e.g.*, Frank Green, *Try to Stop Execution, U.S. Told*, RICHMOND TIMES DISPATCH (Apr. 10, 1998), p. A1, A12 ("Asked [Governor]

Gilmore's reaction to the International Court's ruling, his spokesman, Mark A. Minor, said yesterday that 'the Governor will continue to follow the U.S. courts and the United States Supreme Court.'"). A copy of the Circuit Court order is attached to this memorandum as Exhibit B.[2]

Unless this Court issues an injunction, defendants will, in violation of the obligation owed by the United States to Paraguay under the United Nations Charter, international law, and the United States Constitution, execute Angel Breard as scheduled, on Tuesday, April 14, 1998, at 9:00 p.m. eastern standard time. Complaint ¶ 21.

## I.
## THIS COURT SHOULD GIVE EFFECT TO THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE BECAUSE IT IS BINDING UPON THE UNITED STATES.

### A. Pursuant to the UN Charter and International Law, The ICJ Decision Is The Supreme Law of the Land.

On October 24, 1945, both the United States of America and Paraguay became original members of the United Nations. As a result, the United States agreed to abide by the provisions of the Charter of the United Nations. Pursuant to the mechanism by which the United States Constitution ensures that this country's local

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2. There is presently pending before this Court (1) a petition by the plaintiffs in this original action for a writ of certiorari to the United Court of Appeals for the Fourth Circuit to review the decision of that Court affirming the dismissal on eleventh amendment grounds of a complaint by these plaintiffs for relief under the Vienna Convention, another treaty of the United States, and 42 U.S.C. § 1983 arising from the failure of Virginia officials to abide by their obligation to provide consular notification and access and seeking, among other things, an injunction against the execution, and (2) an application for a stay of or injunction against the impending execution pending disposition of the petition; and (3) a supplemental application for stay or injunction pending resolution of the proceedings in the ICJ. *Paraguay v. Gilmore*, No. 97-1390.

jurisdictions respect its treaty obligations, the Charter of the United Nations became part of the "supreme Law of the Land" and binding throughout the United States. U.S. CONST. art. VI. In addition, pursuant to Article 93(1) of the Charter, "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." U.N. CHARTER, art. 93; *see* RESTATEMENT § 903 cmt. c. Thus, the provisions of the Statute of the ICJ also constitute the "supreme Law of the Land" under the United States Constitution.

Pursuant to Article 36(1) of the Statute of the International Court of Justice, its jurisdiction extends to "all matters specially provided for . . . in treaties and conventions in force . . . ." Statute of the International Court of Justice, Oct. 24, 1945 ("ICJ Statute"), art. 36(1), 59 Stat. 1055.

Both Paraguay and the United States are parties to the Vienna Convention on Consular Relations and to its Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 25, 1963, 21 U.S.T. 326. Article 36 of the Vienna Convention guarantees certain rights of consular notification and access when nationals of a sending state are detained by competent authorites of the receiving state. Article I of the Optional Protocol provides that

> [d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Article 36(6) of the ICJ Statute provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

Article 41 of the ICJ Statute provides that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." While the ICJ has not itself ruled

whether an order indicating provisional measures is binding on the parties, RESTATEMENT § 903 cmt. e (1987), there can be no serious question that it is.

*First*, pursuant to Article 94(1) of the United Nations Charter, the United States has "undertake[n] to comply with the decision of the International Court of Justice in any case to which it is a party." In the plainest meaning of the term, an ICJ order rendered after proceedings in which both parties participated, and by which the Court holds that it has jurisdiction to issue the order and that it is appropriate to do so, is a "decision" of the Court.

*Second*, even if an order indicating provisional measures were not a "decision" in its own right, the United States would still have an obligation to comply. In a standard and oft-repeated formulation, the ICJ has explained that

> the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings . . . .

Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135 (Interim Protection Order of June 22). In other words, the authority to indicate provisional measures is intended to ensure that the Court remains in a position to render a meaningful judgment. Even were an order indicating provisional measures not regarded as a "decision" requiring compliance under the Charter, an agreement to comply with the judgment of a court cannot be squared with the latitude to deprive the court of its ability to render an effective judgment by disregarding a provisional order intended to preserve the rights subject to such a judgment. Hence, by agreeing to abide by the decision of the ICJ in this case, the United States has also agreed to abide by an order indicating provisional measures intended to ensure the effectiveness of any such decision. *E.g.*, Vienna Convention on the Law of

Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

*Finally*, the ICJ is "the principal *judicial* organ of the United Nations." U.N. CHARTER, art. 92 (emphasis added). It is intrinsic to the very definition of a court that a party subject to its jurisdiction must comply with its orders, decisions, and rulings. *E.g., Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). As Judge Sir Gerald Fitzmaurice stated in his separate opinion in the *Northern Cameroons Case*, explaining why provisional measures must be binding:

> Although much . . . of [the ICJ's] incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court -- or any court of law -- being able to function at all.

(Cameroon v. U.K.) 1963 I.C.J. 15, 103 (Interim Protection Order of Dec. 2) (separate opinion of Judge Fitzmaurice). To similar effect, the Iran-United States Claims Tribunal, sitting in Full Tribunal and with the concurrence of all three United States Members, has held that it "has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective." *E-Systems, Inc. v. Islamic Republic of Iran*, Award No. ITM 13-338-FT (Feb 4), 2 Iran-U.S. CTR 51, 57 (1983); *see also* MANLEY OTTMAR HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942, 426 (1943) ("a State is under an obligation to respect the Court's indication of provisional measures").

As a matter of international law, this Court, as a component of the judicial branch of the United States Government, has the capacity to engage the international responsibility of the United States and, correspondingly, the obligation to comply with the United States' international obligations. IAN BROWNLIE, STATE RESPONSIBILITY,

Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility) ("Draft Articles").

This Court should give effect to the decision of the International Court of Justice on Paraguay's request for provisional measures and thereby ensure the United States' compliance with the obligations it has voluntarily undertaken in the U.N. Charter, the ICJ Statute, the Vienna Convention, and the Optional Protocol to that Convention.

**B. As A Court Of Equity, This Court Should Give Effect To the Decision of the International Court of Justice In the Interest of International Comity and the Rule of Law.**

Regardless of the binding effect of the provisional measures indicated by the ICJ on their own terms, this Court should enforce the ICJ's decision on equitable grounds. The essence of equitable discretion is flexibility, and no factor carries as much weight in the exercise of that discretion as the public interest. *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946). When the public interest is involved, the Court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* at 398. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. System Federation No. 40, et al.*, 300 U.S. 515, 552 (1937); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946).

International comity, and respect for the rule of law on the international plane, is a principle of federal law to which this Court should give effect. Since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), in which this Court held that there is "no federal general common law," the Court has recognized that there are nonetheless areas that require the development of a "specialized" federal common

law. *See* Friendly, *In Praise of* Erie -- *And the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). This federal common law arises either pursuant to a congressional grant of jurisdiction, *e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957), or as a result of the need for national uniformity in a given area, *e.g.* *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). It is binding on the states pursuant to the supremacy clause. *See, e.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-27 (1964); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

The need for national uniformity and federal control is most compelling in matters touching on foreign relations. For example, the act of state doctrine precludes a court in the United States from passing on the validity of an "ac[t] of a governmental character done by a foreign state within its own territory and applicable there." *Restatement (Third) of the Foreign Relations Law of the United States* § 443 (1987); *see W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Sabbatino, supra*. The Court has held that that doctrine supplies a federal "principle of decision binding on federal and state courts alike." *Sabbatino*, 376 at 427.[3] So too here, the issue of whether state officials should abide by

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3. *See also Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) (international trade) (nation must "'speak[] with one voice when regulating commercial relations with foreign governments'") (citation omitted); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (alien registration) ("federal power in the field affecting foreign relations [must] be left entirely free from local interference"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (international negotiations and compacts) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (treaty law) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *The Federalist*, Nos. 3-5 (J. Jay), 42 (J.

(continued...)

an order of the International Court of Justice rendered in a case to which the United States is a party is a matter of federal law.

Here, international comity overwhelming counsels in favor of showing respect for a unanimous ruling of the International Court of Justice. *Cf. Hilton v. Guyot*, 159 U.S. 113 (1894) (comity to acts of another nation). As both the major force in international affairs and a nation long committed to the rule of law, the United States would advance the public interest by respecting a ruling of the principal judicial organ of the United Nations. As Judge Schwebel, President of the ICJ, stated in explaining his vote in favor of the order:

> It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Vienna Convention on Consular Relations (Para. v. U.S.) (Provisional Measures Order of Apr. 9, 1998) (Declaration of President Schwebel).[4] As Judge Schwebel recognized, if the United States

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3. (...continued)
Madison), 80 (A. Hamilton).

4. Before his election to the Court in 1981, Judge Schwebel served as, among other things, Deputy Legal Advisor to the United States Department of State and Executive Director of the American Society of International Law. Pursuant to Article 32(1) of the Rules of the Court, Judge Schwebel, as a national of the United States, does not preside in Paraguay's proceeding (continued...)

wishes to advance the rule of law, it must show respect for the rule of law even when -- indeed, especially when -- compliance poses "serious difficulties." *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).

In the exercise of its equitable discretion, in the interest of the rule of law, and out of comity to the principal judicial organ of the modern international legal order, this Court should give effect to the ICJ Order indicating provisional measures.

## II.
## THIS COURT SHOULD ENJOIN DEFENDANTS FROM VIOLATING THE ICJ ORDER AND THE U.N. CHARTER.

### A. *Ex Parte Young* And The Treaties Fully Authorize Paraguay's Suit.

In *Ex parte Young*, this Court held the Eleventh Amendment's sovereign immunity not to apply to suits against state officials acting in their official capacity, provided that the plaintiff sought only a prospective injunction to compel the state officials to comply with federal law. 209 U.S. 123, 159-160 (1908). As this Court explained, where a state official acts in a manner inconsistent with federal law, "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.; accord* U.S. CONST. art. VI, cl. 2.

Under the *Ex parte Young* doctrine, the plaintiff may seek prospective injunctive relief, *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974), against an "ongoing" violation of federal law from which the plaintiff is currently suffering, *Papasan v. Allain*, 478 U.S. 265, 282 (1986), or from the continuing consequences of a completed violation, *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977). This

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4. (...continued)
against the United States.

requirement ensures that a plaintiff cannot use *Ex parte Young* to perpetrate "a raid on the state treasury for an accrued monetary liability." *Milliken v. Bradley*, 433 U.S. 267, 290 n.22 (1977). At the same time, the availability of injunctive relief under *Ex parte Young* is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Papasan*, 478 U.S. at 278 (internal quotation omitted).

Here, plaintiff seeks precisely the relief permitted under *Ex parte Young* -- an injunction preventing defendants, acting in their official capacities, from executing Breard in violation of Paraguay's rights under the ICJ Order and the U.N. Charter. The doctrine of *Ex Parte Young*, 209 U.S. 123, 156 (1908), permits a federal court to enjoin state officers "who threaten and are about to commence" unlawful activity. *See also Morales v. Trans-World Airways, Inc.*, 504 U.S. 374, 381 (1992). As set forth above, the ICJ Order is binding on the United States through the mechanism of the United Nations Charter. No violation of that order has yet occurred, but the ICJ Order, and with it federal law in the form of the U.N. Charter, are in danger of imminent violation. Mr. Breard's execution is scheduled for tomorrow, April 14, 1998, and the Governor of Virginia has publicly made known his intention to see the execution through unless this Court orders otherwise. *See, e.g.*, Frank Green, *Try to Stop Execution, U.S. Told*, RICHMOND TIMES DISPATCH (Apr. 10, 1998), p. A1, A12. In these circumstances, there can be no question that plaintiffs face the threat of imminent, future violation of their federal rights by way of the intention of Virginia officials to go forward with the execution of Paraguay's national even in the face of the ICJ Order directing the United States to halt that execution. There can also be no question that the relief plaintiffs seek is prospective, as the rights on which they found this complaint arose just last Thursday when the ICJ issued its order and the execution they seek to halt has not yet taken place. An injunction or stay from this Court would therefore be purely prospective in nature and would prevent the

defendant State officials from their intended, imminent violation of federal law.[5]

In any event, by its express terms, the Eleventh Amendment does not apply to this action by the Republic of Paraguay, a foreign state, as opposed to citizens or subjects thereof. U.S. CONST. amend. XI. Nor do any underlying principles of sovereign immunity bar the action. While *Monaco v. Mississippi*, 292 U.S. 313 (1934), recognized a rule of nonconstitutional sovereign immunity in suits based on contractual obligations brought by foreign states against states of the United States, that rule should not extend to an action by a foreign state asserting treaty rights. If the Commonwealth of Virginia "does not exist" for foreign relations purposes, *United States v. Pink*, 315 U.S. 203, 234 (1942) (internal quotation omitted), neither it nor its officials should be permitted to claim immunity from suit in federal court in an action, like this one, that seeks to enforce an international obligation entered into by the United States in the exercise of its authority in foreign relations. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936) (because states never had sovereignty for purposes of foreign relations, federal government's authority in the area is plenary). Simply put, in the area of foreign relations and the United States' international obligations, the individual states had no sovereign immunity to cede -- as the United States explained in its brief *amicus curiae* to the Court of Appeals in the case now pending before this Court by way of Paraguay's Petition. Brief for *Amicus Curiae* United States at 30-32 (attached as Exhibit 6 to Application for Stay of or Injunction Against

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5. For that reason, the holding of the Court of Appeals as to which Paraguay seeks this Court's review by way of its pending Petition in No. 97-1390 would not bar the present complaint. While Paraguay believes that decision is wrong for the reasons set forth in the Petition, the reasoning of the Court of Appeals simply would not apply to the rights afforded Paraguay by the ICJ Order and the future harm to those rights posed by the impending execution in violation of that Order.

Execution in No. 97-1390) (March 31, 1998)) (citing *Curtiss-Wright Export*, 299 U.S. at 315-18, and *Pink*, 315 U.S. at 234).[6]

**B. Plaintiffs Are Entitled To The Relief They Seek.**

The traditional standard for granting an injunction, preliminary or permanent, requires the plaintiff to show that "in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inc.*, 422 U.S. 922, 931 (1975). The only difference between the two standards is that for a preliminary injunction a plaintiff need only show that his success on the merits is likely whereas for a permanent injunction a plaintiff must actually succeed on the merits. *See University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981).

Under either standard, Paraguay is entitled to the injunction it seeks. As an initial matter, there can be no dispute as to the relevant facts, as the only facts relevant to this request are the issuance of the ICJ Order and the impending execution.

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6. In the action now before this Court on Paraguay's Petition in No. 97-1390, the District Court had held that Paraguay's action was barred by the *Rooker/Feldman* doctrine. *Paraguay v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). The Court of Appeals did not address that holding. *Paraguay v. Allen*, 134 F.3d 622, 629 n.4 (4th Cir. 1998). The District Court's holding is squarely foreclosed by this Court's decision in *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994), which the District Court did not cite, and in which this Court held that *Rooker/Feldman* does not apply where, as here, the federal plaintiff "was not a party in the state court" and thus "was in no position to ask [this Court] to review the state court's judgment." In any event, there can be no *Rooker/Feldman* issue on this complaint, as the relief plaintiffs seek could have no affect on the validity of the conviction and sentence at this time; plaintiffs ask only that, in accord with the ICJ Order, the execution be stayed or enjoined until proceedings are had in the International Court of Justice.

Further, it is plain that unless this Court enjoins Defendants from executing Breard on Tuesday, Paraguay's national will be dead. In that event, the ICJ Order could never be complied with. It goes without saying that the fact that "irreparable harm will result if a stay is not granted . . . is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring).

Similarly, there can be no doubt of Paraguay's likelihood of success on the merits. The wording of the ICJ Order is clear: the United States is to ensure that Mr. Breard is not executed. An order that binds the United States also binds the state actors charged with the enforcement of that order. U.S. CONST. art. VI, cl. 2 (The United States' international obligations form part of "the supreme Law of the Land."). State interests cannot override federal authority in the area of foreign relations. *United States v. Pink*, 315 U.S. at 233-34 (individual states "do[] not exist" for foreign relations purposes); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 315-22 (because states never had sovereignty for purposes of foreign relations, federal government's authority in the area is plenary); *see also Zschernig v. Miller*, 389 U.S. 429 (1968).

In addition, were the Court to find it necessary to balance the hardships, they would clearly favor Paraguay. If this Court gives effect to the ICJ Order, Mr. Breard will still remain in custody. If the United States prevails on the merits, Virginia will be able to execute Mr. Breard. If the United States did not prevail, Virginia would at worst -- depending upon the relief ordered by the Court -- have to retry Mr. Breard, as Paraguay has sought no relief barring retrial or immunizing Mr. Breard from the charges Virginia has brought. The impact on Virginia of a delay in the execution of Mr. Breard cannot compare to the irreparable injury caused by his death -- not to mention the magnitude of a decision by this Court not to give effect to a unanimous decision of the International Court of Justice.

Finally, as discussed above in Part I.B., the injunction sought by Paraguay is clearly in the public interest. The United States is responsible under international law for the acts of its constituent

entities. *See, e.g.*, Jiménez de Aréchaga, *International Responsibility*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW, 531, 557 (Max Sørensen, ed., 1968) ("It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations."); Draft Articles at 127. If this Court does not enjoin defendants from executing Mr. Breard, it will place the United States squarely in violation of the ICJ Order and the U.N. Charter. This Court should not countenance such a result.

## III.
## THIS COURT SHOULD GRANT PARAGUAY'S MOTION FOR LEAVE TO FILE.

Mindful of this Court's busy appellate docket and stated preference against acting as trier of fact in the first instance, Paraguay nevertheless respectfully submits that this is precisely the type of action in which the Court should exercise its original jurisdiction. Paraguay's case presents issues "of federal law and national import as to which [the Court is] the primary overseer[]." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971)

This Court makes "case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within [its] constitutional original jurisdiction . . . exercis[ing] that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system." *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (*quoting Texas v. New Mexico*, 462 U.S. 554, 570 (1983) (internal citations omitted). In *Wyandotte*, the Court held that it can decline to exercise its concurrent original jurisdiction

> only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an

> inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to . . . its other responsibilities.

401 U.S. at 499.

Applying those guidelines here, the Court should grant Paraguay's motion. *First*, because this motion seeks only to enforce the order issued by the ICJ enjoining the execution of Mr. Breard until that court arrives at a final decision on the merits, the case does not present significant difficulties of factfinding. *Id.* at 498. The only relevant facts are the terms of the ICJ Order and the imminent execution, neither of which can be or are disputed. Hence, this complaint calls upon the Court's competence as a tribunal that decides questions of law of national importance.

*Second*, this motion, seeking to prevent the failure of state officials to respect treaty obligations owed by the United States to a foreign sovereign, falls within a category of cases that the Constitution's Framers specifically intended the federal courts in general, and this Court in particular, to decide. For the reasons set forth above, a denial of the motion in this case would clearly "disserve . . . the principal policies underlying the Article III jurisdictional grant," *id.* at 499, over "Cases affecting . . . Consuls." U.S. CONST. art. III, § 2, cl. 2. *See also* Petition, No. 97-1390, at 22-29.

## CONCLUSION

For the foregoing reasons, Paraguay respectfully requests that this Court (*i*) grant Paraguay's motion for leave to file; and (*ii*) issue a temporary restraining order or preliminary injunction barring defendants from executing of Paraguay's national, Angel Francisco Breard, during the pendency of this motion for leave to file, or a permanent injunction barring defendants from executing him at any time prior to the resolution of Paraguay's action against the United States in the International Court of Justice.

Dated: April 13, 1998

Respectfully submitted,

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